Supreme Court, U.S.
FILED
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

SAMUEL MARTINEZ-SERRANO

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL APPENDIX

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U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

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File: A29 264 170 - San Francisco Date: JUL 29 1991

In re: SAMUEL MARTINEZ-SERRANO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Michael Hoffman
Accredited Representative
United States Catholic Conference
Migration and Refugee Services
582 Market Street, Suite 318
San Francisco, California 94104

ON BEHALF OF SERVICE: Mike A. Nisperos, Jr.
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Entered without inspection

APPLICATION: Voluntary departure

ORDER:

PER CURIAM. The decision of the immigration judge is affirmed. We have not been persuaded by the respondent's contentions. A request the respondent has made for oral argument before this Board is denied as a matter of discretion. See 8 C.F.R. § 3.1(c).

The relief the respondent is requesting cannot be accorded by the immigration judge or this Board. He wants to leave the United States voluntarily without a determination on whether he is deportable as charged in the Order to Show Cause. According to the respondent, he could then leave the United States and return immediately on the basis of his temporary resident status as a "Special Agricultural Worker." See generally section 210 of the Immigration and Nationality Act, 8 U.S.C. § 1160, for information about that status.

Pursuant to the provisions of 8 C.F.R. § 242.5, the district director could have allowed the respondent to leave the United States voluntarily without the institution of deportation proceedings. The decision on whether to institute deportation proceedings against the respondent was a matter of prosecutorial discretion. See Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971). When the district director has instituted such proceedings against an alien, however, the immigration judge who presides over the proceedings must make a finding on deportability. Neither the immigration judge nor this Board can allow the alien to depart from the United States voluntarily without making that determination. Id. Moreover, in the present case, we are satisfied that the respondent's deportability has been established by evidence that is clear, unequivocal, and convincing. See section 291 of the Act, 8 U.S.C. § 1361. The respondent's appeal, accordingly, is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

(Signature) James P. Morris
FOR THE BOARD

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

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File: A29 264 170 - San Francisco Date: JUL 29 1991

In re: SAMUEL MARTINEZ-SERRANO

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: James Michael Hoffman
Accredited Representative
United States Catholic Conference
Migration and Refugee Services
582 Market Street, Suite 318
San Francisco, California 94104

ON BEHALF OF SERVICE: Roger S. Jackson
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] -
Entered without inspection

APPLICATION: Motion to Reopen

ORDER:

The respondent has made a motion to reopen deportation proceedings in order to apply for a waiver of deportability pursuant to section 241(a)(1)(E)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(E)(ii). The motion will be denied.

The respondent is a native and citizen of Mexico who initially entered this country without inspection in approximately 1980. He was granted temporary lawful permanent resident status in 1987, as a special agricultural worker ("SAW"), pursuant to section 210(a)(1) of the Act, 8 U.S.C. § 1160(a)(1). On February 26, 1990, he was arrested by immigration officials after he attempted to smuggle his three minor children across the Mexican border without inspection. An Order to Show Cause was issued on February 27, 1990, charging him with deportability pursuant to section 241(a)(2) of the Act, 8 U.S.C. §§ 1251(a)(2), as one who has entered without inspection. He was not charged with deportability as a smuggler. At his deportation proceeding on September 24, 1990, the respondent was found deportable by the immigration judge based on the fact that he admitted alienage but refused to divulge the time and manner of his entry. He then applied for and was granted voluntary departure pursuant to section 244(e) of the Act, 8 U.S.C. § 1254(e). The respondent then appealed, asserting that the immigration judge erred in concluding that he was required to find the respondent deportable before granting him the privilege of voluntary departure. In a decision dated July 29, 1991, the Board concluded that, although the district director could have allowed the respondent to depart voluntarily without the institution of deportation proceedings, he did not do so. Once deportation proceedings were instituted, the immigration judge was required to make a finding of deportability and the Board of Immigration Appeals was not the proper forum in which to seek a review of the rationale underlying a district

director's decision in this regard. See Matter of Ramirez-Sanchez, 18 I&N Dec. 503 (BIA 1980); Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Lennon, 15 I&N Dec. 9 (BIA 1974); Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971). The respondent has now made a motion to reopen to allow him to apply for a waiver of inadmissibility pursuant to section 241(a)(1)(E)(ii) of the Act, which was not enacted until after the immigration judge's decision in this case.

A party who seeks a remand or to reopen proceedings to pursue relief bears a heavy burden of proving that if the proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence would likely change the result in the case. Matter of Coelho, Interim Decision 3172 (BIA 1992). Motions to reopen will not be granted unless it appears to the Board that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. § 3.2 (1993). Accordingly, the Board may deny a motion to reopen based upon the failure to establish a prima facie case for the relief sought, in the absence of previously unavailable material evidence, and in the exercise of discretion.

In this case, the respondent has not established statutory eligibility for the relief sought because he was found deportable under section 241(a)(2) of the Act (now 241(a)(1)(B)), and the waiver he seeks waives deportability only under section 241(a)(1)(E)(i) of the Act for an alien who is deportable as one who "knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.;" As the respondent has not been

charged under section 241(a)(1)(E)(i) of the Act, he needs no 241(a)(1)(E)(iii) waiver. 1/

Furthermore, even if he had been so charged under that section and was granted a waiver, he would remain deportable pursuant to section 241(a)(2), for which there exists no waiver.2/ Accordingly, the motion to reopen and remand will be denied.

ORDER: The motion to reopen and remand is denied.

(Signature) Fred W. Vaca
FOR THE BOARD

1/ Although the respondent refers repeatedly to a section 241(a)(1)(E)(ii) waiver, that section is only applicable to those aliens who smuggled in family members prior to May 5, 1988. Accordingly, it is completely inapplicable to this respondent, who smuggled in his children in February 1990. We presume, therefore, that he is referring to section 241(a)(1)(E)(iii) in his brief on appeal.

2/ Although some circuits have allowed lawful permanent residents who are deportable for entering without inspection to apply for a 212(c) waiver, this respondent is not and has never been a lawful permanent resident. See Matter of Bedoya-Valencia v. INS, 6 F.3d 891 (2d Cir. 1993); Matter of Chavez-Calderon, Interim Decision 3212 (BIA 1993).